No. 80-581

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

COMMONWEALTH EDISON COMPANY, CENTRAL ILLINOIS LIGHT COMPANY, DAIRYLAND POWER COOPERATIVE, DETROIT EDISON COMPANY, INTERSTATE POWER COMPANY, LAKE SUPERIOR DISTRICT POWER COMPANY, LOWER COLORADO RIVER AUTHORITY/CITY OF AUSTIN, MINNESOTA POWER & LIGHT COMPANY, NORTHERN STATES POWER COMPANY, UPPER PENINSULA GENERATING COMPANY, WISCONSIN POWER & LIGHT COMPANY, DECKER COAL COMPANY, PEABODY COAL COMPANY, WESTMORELAND RESOURCES, INC. and WESTERN ENERGY COMPANY,

Appellants,

—against—

STATE OF MONTANA, TED SCHWINDEN, GOVERNOR OF MONTANA, HELEN J. FEAVER, DIRECTOR OF THE STATE DEPARTMENT OF REVENUE, and MAURICE L. BRUSETT, DIRECTOR OF ADMINISTRATION AND STATE TREASURER,

Appellees.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF MONTANA

JOINT APPENDIX

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January, 1981

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APPEAL DOCKETED OCTOBER 10, 1980
PROBABLE JURISDICTION NOTED DECEMBER 8, 1980

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Additional Documents Are Printed in the Appendix to Appellants' Jurisdictional Statement.

Docket Entries.

REGISTER OF CIVIL ACTIONS

DISTRICT COURT

	Attorneys
COMMONWEALTH EDISON CO., CENTRAL ILLINOIS LIGHT CO., *et al.*,	Patrick Hooks
vs.	
STATE OF MONTANA.	Mike Greely

No. 42657

Date	Memoranda	Minute Book	Costs
6/20/78	Filed Complaint for refund of taxes paid under protest and for declaratory and injunctive relief, issued summons		$20.00
	Do Motion for Admission of Attorneys		
	Do Order	75/367	
	Do Plaintiff's first set of Interrogatories to Defendant		
	Do Plaintiff's first request for Production of Documents		
6/27/78	Do Summons and Return		

Docket Entries—District Court
(Commonwealth Edison action)

Date	Memoranda	Minute Book	Costs
6/28/78	Do Return of Service		
	Do Stipulation and Acknowledgement		
7/ 3/78	Do Stipulation	75/381	
7/10/78	Do Motion to Extend Time and Order and Crt.	75/385	
8/ 3/78	Do Motion to Extend time and order	75/410	
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8/31/78	Do Motion		
	Do Affidavit in Support of Motion		
	Do Affidavit in Support of Motion		
	Do Memorandum in Support of Motion		
	Do O.S.C. and Temp. Stay 9-12-78 10 a.m.	75/460	
	Do Certificate of Service by Mail		
9/ 1/78	Do Motion to Dismiss		
9/ 8/78	Do Brief of Defendant	75/481	
9/18/78	—File Briefs by 9/28/78	75/481	
9/28/78	Do Motion to Extend time and Order	75/491	
10/18/78	Do Motion to Extend time and Order	77/12	
11/ 1/78	Do Cross motion		

Docket Entries—District Court
(Commonwealth Edison action)

Date	Memoranda	Minute Book	Costs
	Do Plaintiff's memo in opposition to Defendants Motions to dismiss		
11/ 2/78	—File briefs by December 4, 1978	77/34	
12/11/78	Do Motion and order extending time for filing a reply brief	77/78	
1/ 5/79	Do Letter		
	Do Motion for leave to file brief *amicus curiae*		
	Do affidavit of mailing		
1/11/79	Do Order 2-7-79 3:00 p.m.	77/120	
	Do Order 2-7-79 9:00 a.m.	77/120	
1/23/79	Do Defendant's reply brief and brief in Opposition to Plaintiff's motion to summary judgment		
	Do Appendix Volume I		
	Do Appendix Volume II		
1/31/79	Do Motion for Postponement of Hearing	77/144	
	Do Minute Entry 3-8-79 9:00 a.m. Hearing on Motion to Dismiss and hearing on Texas motion to file brief *amicus curiae*	77/144	
	Do Minute Entry 3-8-79 3:00 p.m.	77/144	
2/ 2/79	Do Praecipe to Enter Name of Counsel		

Docket Entries—District Court
(Commonwealth Edison action)

Date	Memoranda	Minute Book	Costs
2/ 1/79	—Court issued a ruling to Continue Hearing	77/144	
2/16/79	Do Motion for leave to file or participate in brief *amicus curiae*		
	Do Proof of Service		
3/ 8/79	Do Motion for Admission of Counsel		
3/ 9/79	Do Brief *amicus curiae* of State of Texas		
	—A hearing for motion to dismiss and motion for summary judgment was held this day. A motion for severance was granted. Motion to consolidate was heard and Court consolidated 42657 and 42689. Proposed opinion and orders are to be submitted by 3-26-79. Court heard counsel and ordered Texas be allowed to appear as *amicus curiae*	77/173	
3/26/79	Do Order to Consolidate with 42689	77/200	
	Do Defendant's Proposed Opinion and Order on Count IV		
	Do Plaintiff's Supplemental Memo in Opposition to motion to dismiss		

Docket Entries—District Court
(Commonwealth Edison action)

Date	Memoranda	Minute Book	Costs
	Do Plaintiff's proposed Decision of Count IV		
	Do Proposed Decision Denying Motion to Dismiss		
4/ 2/79	Do Order—Count IV of Plaintiff compl. be severed	77/207	
	Do Plaintiff's rebuttal memo in opposition to Defendant's motion to dismiss		
4/ 4/79	Do Transcript of Proceedings		
4/ 3/79	Do Defendant's final reply brief		
4/ 5/79	Do Letter from McGrath Asst. Atty. Gen.		
	Do Corrected copy of Defendant's final reply brief		
4/17/79	Do Defendant's proposed opinion and order		
6/ 4/79	Do Order to submit any comments on or before 6/25/79		
6/ 4/79	Do Letter		
	Do Stipulation for subst. of parties	77/296	
	Do Order Time schedule	77/296	
6/ 5/79	Do Order—Plaintiff cannot require sequestration, Judgment be issued accordingly	77/296	
6/22/79	Do Defendant's Comments and Response by Atty. Gen.		

Docket Entries—District Court
(Commonwealth Edison action)

Date	Memoranda	Minute Book	Costs
7/ 3/79	—Judgment on Count IV filed ordering Defendants motion to dismiss Count IV granted and Plaintiffs cross-motion for summary judgment as to Count IV is denied.		
7/16/79	Do Notice of Entry of Judgment		
7/27/79	Do Order—granting motion to dismiss Counts I, II, III was granted	77/353	
8/ 3/79	Do Letter Do Notice of Appeal		
8/ 6/79	Do Letter to Judge Meloy Do Letter to Judge Meloy Do Argument—Cited case Do Letter from Patrick Hooks 8/15/79		
8/16/79	Do Stipulation that plaintiffs need not file an Undertaking of costs on appeal	77/375	
8/22/79	Do Judgment on Counts I, II, III, JB 15 p. 42 Do Notice of Entry	77/380	
8/24/79	Do Letter from Patrick Hooks Do Notice of Appeal		
9/ 5/79	Do Letter from Patrick Hooks 9/4/79		

Docket Entries—District Court
(Commonwealth Edison action)

Date	Memoranda	Minute Book	Costs
	Do Stipulation and Affidavit of Mailing	77/403	
9/11/79	Do Stipulation for entry of an order extending time for transmission of record on appeal and order.		
	—Extension of time to 10-2-79	77/403	

Docket Entries

REGISTER OF CIVIL ACTIONS

DISTRICT COURT

	Attorneys
LAKE SUPERIOR DISTRICT POWER CO., NORTHERN STATES POWER CO., *et al.*	Patrick Hooks Rogers & Wells
vs.	
STATE OF MONTANA, THOMAS L. JUDGE, *et al.*	Ross Cannon

No. 42689

Date	Memoranda	Minute Book	Costs
6/28/78	Filed Complaint for refund of taxes paid under protest and for declaratory relief, issued summons		$20.00
7/19/78	Do Motion to extend time and order	76/11	
7/31/78	Do Summons and Return Do Motion to extend time	75/410	
8/31/78	Do Amended Complaint for refund of taxes paid under protest		

Docket Entries—District Court
(Lake Superior action)

Date	Memoranda	Minute Book	Costs
	and for declaratory and injunctive relief		
	Do Motion to Strike and Dismiss		
9/ 8/78	Do Letter from M.P.G.		
	Do Consent to Substitute Attorneys		
	—Do Brief of Defendant	75/481	
9/18/78	—File Brief by 9/28/78	75/481	
9/25/78	Do Motion to strike and dismiss		
9/28/78	Do Motion to extend time and Order		
10/ 2/78	Do Brief in Support of Defendant's motion to strike and to dismiss plaintiff's amended complaint		
10/19/78	Do Motion to extend time and order	77/12	
11/ 1/78	Do Plaintiff Western Energy Company's memo in opposition to defendants motion to dismiss or strike		
	Do Plaintiff's memo in opposition to Defendant's motion to dismiss or strike		
11/ 2/78	—File briefs by Dec. 4, 1978	77/34	
11/16/78	Do Plaintiff Western Energy Co.'s, Brief on motion to strike and/or dismiss complaint		

Docket Entries—District Court
(Lake Superior action)

Date	Memoranda	Minute Book	Costs
12/11/78	Do Motion and order extending time for filing reply brief	77/78	
1/23/79	Do Defendant's reply brief		
1/31/79	Do Motion for postponement of hearing		
2/ 2/79	Do Minute Entry 3-8-79 9:00 a.m.		
	3-8-79 3:00 p.m.	77/145	
3/ 9/79	—Hearing held at this time on motion to dismiss and motion for summary judgment and a motion for severance was granted. Motion to consolidate was heard and Court consolidated 42657 and 42689. Proposed opinion and orders. Order on motion to consolidate is to be prepared and Court ordered that Texas be allowed to appear as *amicus curiae*	77/173	
3/26/79	Do Order to Consolidate with 42657	77/200	
	Do Plaintiffs Supp. Memo Opposition to motion to dismiss		
	Do Decision (Proposed) on Count IV		
	Do Defendants Proposed Opinion Count IV		

Docket Entries—District Court
(Lake Superior action)

Date	Memoranda	Minute Book	Costs
	Do Proposed Decision to dismiss and Consolidate		
4/ 2/79	Do Order to sever amended complaint from other counts	77/207	
	Do Letter from Attorney Hooks		
4/ 5/79	Do Corrected copy of Def. Final Reply brief		
4/17/79	Do Defendant's proposed opinion and order		
6/ 1/79	Do Letter		
	Do Stipulation for sub. of parties	77/296	
6/ 4/79	Do Order to submit comments by June 25, 1979	77/296	
6/ 5/79	Do Order—Plaintiffs cannot require sequestration Judgment to be issued accordingly.	77/296-298	
7/ 3/79	Do Judgment on Count IV—Defendants motion to dismiss Count IV granted plaintiffs motion for summary judgment denied		
	Do Notice of Entry of Judgment	77/330	
7/27/79	Do Order filed in 42657—Motions to dismiss Counts I, II, III granted	77/353	
8/ 3/79	Do Letter		
	Do Notice of Appeal filed 42657		

Docket Entries—District Court
(Lake Superior action)

Date	Memoranda	Minute Book	Costs
8/16/79	Do Stipulation that plaintiffs need not file an undertaking of costs on appeal	77/375	
8/22/79	Do Judgment on Counts I, II, III JB 15 p. 156		
	Do Notice of Entry	77/380	
8/24/79	Do Notice of Appeal		
	Do Letter		
	Do Notice of Appeal		
9/ 4/79	Do Letter from Patrick Hooks		
9/ 5/79	Do Stipulation and Affidavit of Mailing	77/403	
9/11/79	Do Stipulation for entry of an order extending time for transmission of record on appeal and order—extending time to 10-2-79	77/403	

Docket Entries

REGISTER OF CIVIL ACTIONS

DISTRICT COURT

	Attorneys
COMMONWEALTH EDISON CO., CENTRAL ILLINOIS LIGHT CO., *et al.*,	Rogers & Wells Patrick Hooks
vs.	
STATE OF MONTANA, THOMAS L. JUDGE, *et al.*	Ross W. Cannon

No. 42971

Date	Memoranda	Minute Book	Costs
9/25/78	Filed Complaint, Issued Summons		$20.00
	Do Summons		
10/16/78	Do Motion		
	Do Brief in Support of Defendants motion		
11/15/78	Do Plaintiff's memo in Opposition to Defendant's motion to strike and/or dismiss		

Docket Entries—District Court
(Commonwealth Edison action)

Date	Memoranda	Minute Book	Costs
12/11/78	Do Motion and Order extend time until 1/22/79	77/78	
3/26/79	Do Proposed Decision Count IV Do Proposed Decision Motion Dismiss & Consolidate Do State's Proposed Order		
6/ 5/79	Do Order—Plaintiffs cannot require sequestration Judgment to be issued accordingly	77/298	
	—Judgment on Count IV Defendant's motion to dismiss is granted and plaintiff's cross-motion is denied	77/330	
7/27/79	Do Order filed in 42657 Motions to dismiss on Counts I, II, III is granted	77/353	
8/ 3/79	Do Letter Do Notice of Appeal filed 42657		
8/16/79	Do Stipulation (copy)		
8/22/79	Do Judgment on Counts I, II, III JB 15 p. 42 Do Notice of Entry of Judgment	77/380	
8/24/79	Do Letter Do Notice of Appeal		
9/ 4/79	Do Letter from Patrick F. Hooks		

Docket Entries—District Court
(Commonwealth Edison action)

Date	Memoranda	Minute Book	Costs
9/ 5/79	Do Stipulation and Affidavit of Mailing	77/403	
9/11/79	Do Stipulation of Entry of an order extending time for transmission of record on appeal and order		
	—Extending time to 10-2-79	77/403	

Docket Entries

REGISTER OF CIVIL ACTIONS

DISTRICT COURT

	Attorneys
LAKE SUPERIOR DISTRICT POWER COMPANY, NORTHERN STATES POWER COMPANY, *et al.*	John Carl
vs.	
STATE OF MONTANA, THOMAS L. JUDGE, *et al.*	Ross W. Cannon

No. 42972

Date	Memoranda	Minute Book	Costs
9/25/78	Filed Complaint, Issued Summons		$20.00
	Filed Complaint, Issued Summons		20.00
	Do Summons		
	Do Summons		
10/16/78	Do Motion		
	Do Brief in Support of Defendants motion		

Docket Entries—District Court
(Lake Superior action)

Date	Memoranda	Minute Book	Costs
11/15/78	Do Plaintiff's memo in opposition to Defendant's motion to strike and/or dismiss		
	Do Plaintiff's memo in opposition to Defendant's motion to dismiss or strike		
12/11/78	Do Motion and Order extending time	77/78	
3/26/79	Do Proposed Decision Count IV		
	Do Proposed Decision Deny Motion and Consolidate		
	Do State's Proposed Order		
6/ 5/79	Do Order—Plaintiffs cannot require sequestration		
	Judgment to be issued accordingly	77/298	
	—Judgment on Count IV ordering Defendant's motion to dismiss is granted and plaintiffs' cross-motion is denied	77/330	
7/27/79	Do Order filed in 42657 motion to dismiss on Counts I, II, III is granted	77/353	
8/ 3/79	Do Letter		
	Do Notice of Appeal filed in 42657		
8/16/79	Do Stipulation (copy)		

Docket Entries—District Court
(Lake Superior action)

Date	Memoranda	Minute Book	Costs
8/22/79	Do Judgment on Counts I, II, III JB 15 p. 156	77/380	
	Do Notice of Entry of Judgment		
8/24/79	Do Letter		
	Do Notice of Entry		
9/ 4/79	Do Letter from Patrick Hooks		
9/ 5/79	Do Stipulation and Affidavit of Mailing	77/403	
9/11/79	Do Stipulation for entry of an order extending time for transmission of record on appeal and order		
	—Extending time to 10-2-79	77/403	

Docket Entries

REGISTER OF CIVIL ACTIONS

DISTRICT COURT

	Attorneys
COMMONWEALTH EDISON CO., CENTRAL ILLINOIS LIGHT CO., *et al.*	Patrick Hooks
vs.	
STATE OF MONTANA, THOMAS L. JUDGE, *et al.*	Ross W. Cannon

No. 43289

Date	Memoranda	Minute Book	Costs
12/21/78	Filed Complaint, Issued Summons		$20.00
12/22/78	Do Summons and Aff. of Service		
1/10/79	Do Motion to Dismiss and/or to Strike		
1/15/79	Do Brief in Support of Defendant's motion to strike		
1/29/79	Do Plaintiff's memo in opposition to Defendant's motion to strike and/or dismiss		

Docket Entries—District Court
(Commonwealth Edison action)

Date	Memoranda	Minute Book	Costs
3/26/79	Do Proposed Decision		
	Do Proposed Decision Deny Motion to Dismiss and Consolidate		
	Do State's Proposed Order		
6/ 5/79	Do Order—Plaintiffs cannot require sequestration. Judgment to be issued accordingly	77/298	
	—Judgment on Count IV ordering Defendant's motion to dismiss is granted and plaintiff's cross-motion denied	77/330	
7/27/79	Do Order—filed in 42657 on motion to dismiss Counts I, II, III granted	77/353	
8/ 3/79	Do Letter		
	Do Notice of Appeal filed in 42657		
8/16/79	Do Stipulation (copy)		
8/22/79	Do Judgment on Counts I, II, III JB 15 p. 42		
	Do Notice of Entry	77/380	
8/24/79	Do Letter		
	Do Notice of Appeal		
9/ 4/79	Do Letter from Patrick Hooks 9-4-79		
9/ 5/79	Do Stipulation and Affidavit of Mailing	77/403	

Docket Entries—District Court
(Commonwealth Edison action)

Date	Memoranda	Minute Book	Costs
9/11/79	Do Stipulation of Entry of Order extending time for transmission of record on appeal and order—Extended to 10-2-79	77/403	

Docket Entries

REGISTER OF CIVIL ACTIONS

DISTRICT COURT

	Attorneys
LAKE SUPERIOR DISTRICT POWER, NORTHERN STATES POWER CO., *et al.*	Patrick Hooks John Carl
vs.	
STATE OF MONTANA, THOMAS L. JUDGE, *et al.*	Ross W. Cannon

No. 43288

Date	Memoranda	Minute Book	Costs
12/21/78	Filed Complaint, Issued Summons		$20.00
	Do Complaint of Western Energy and Issued summons		
12/22/78	Do Summons and Affidavit of Service		
1/10/79	Do Motion to Dismiss and to Strike		
1/15/79	Do Brief in Support of Defendant's motion		

Docket Entries—District Court
(Lake Superior action)

Date	Memoranda	Minute Book	Costs
1/29/79	Do Plaintiff's Memo in opposition to Defendant's motion to strike and/or dismiss		
2/16/79	—Defendant's motion to strike or dismiss set for 3/1/79 2:00 p.m.	76/290	
2/20/79	—Hearing is vacated without date	76/292	

Docket Entries

REGISTER OF ACTIONS

SUPREME COURT OF THE STATE OF MONTANA

No. 14982

COMMONWEALTH EDISON COMPANY, *et al.*,

Plaintiffs and Appellants,

—VS.—

STATE OF MONTANA, *et al.*,

Defendants and Respondents.

LAKE SUPERIOR DISTRICT POWER CO., *et al.*,

Plaintiffs and Appellants,

—VS.—

STATE OF MONTANA, *et al.*,

Defendants and Respondents.

Attorneys for Plaintiffs-Appellants Commonwealth Edison Co., et al.

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Docket Entries—
Supreme Court of the State of Montana
(consolidated action)

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Filed in the District Court of the 1st Judicial District, Lewis and Clark County

Nature of Action: Coal tax

Docket Entries—
Supreme Court of the State of Montana
(consolidated action)

MEMORANDUM OF PROCEEDINGS
(Commonwealth Edison Co. et al.)

Date	Memoranda	Minute Book	Costs
9/21/79	Order Per Curiam; prehearing conference set 9:00 on Thurs., Sept. 27; matters include length of briefs, contents of record and time and order of argument		$20.00
9/27/79	Application and Order that State of Texas be permitted to appear as *amicus curiae* and shall file brief under same briefing schedule as appellants		10.00
9/28/79	Order per Curiam. It is ordered (1) The appeal in Cause No. 14991 is hereby consolidated with this cause for oral argument and determination on appeal (2) The record on appeal shall consist of all records and Exhibits before the District Court in any consolidated action herein (3) See Order (4) See Order (5) This consolidated appeal is set for hearing and Oral argument April 15, 1980 at 9:30 a.m. (6), (7), (8) See order		

Docket Entries—
Supreme Court of the State of Montana
(consolidated action)

Date	Memoranda	Minute Book	Costs
10/ 2/79	District Court Files 42971—43288—42657—42689—43289—Exhibits		
11/14/79	Appellants' Brief (Commonwealth Edison Co. *et al.*)		
11/14/79	Appellant Western Energy Company		$20.00
11/15/79	*Amicus* Brief State of Texas		
1/31/80	Application and Order granting State Mont. to Feb. 15, 1980 to file its Brief and Appellants shall have until March 31, 1980 to file Reply Brief.		
2/ 4/80	Order hearing & Oral argument rescheduled for April 21, 1980 at 9:30 a.m. (see order)		
2/15/80	Respondent's Brief.		
3/31/80	Appellants Reply Brief		
4/15/80	Order No. Dakota tax commissioner is granted permission to file *Amicus* Brief.		
4/15/80	*Amicus curiae* Brief (No. Dakota)		
4/21/80	Argued & Submitted. William R. Glendon, William Rogers, John Carl, Appellants. Mike Greely, Ross Cannon, Mike McGrath and Mike McCarter, Re-		

Docket Entries—
Supreme Court of the State of Montana
(consolidated action)

Date	Memoranda	Minute Book	Costs
	spondents. *Amicus curiae:* Mark White, Leo Wilking		
3/28/80	Pre-assigned, Judge Sheehy		
7/17/80	Opinion; Justice Sheehy; affirmed; Unanimous.		
7/30/80	Remittitus and copy of opinion sent to Clerk District Court Helena and Court File and Exhibits returned to Clerk Cert. No. 6648489 and 6648491 and 6648493.		
10/ 2/80	Notice of Appeal to U.S. Supreme Court.		
10/ 6/80	Notice of Appeal to U.S. Supreme Court (John Carl).		
12/11/80	Order from U.S. Supreme Court noting probable jurisdiction.		

Docket Entries

Judgt.: June 27, 1979

REGISTER OF ACTIONS

No. 14991

COMMONWEALTH EDISON COMPANY, *et al.*,

Plaintiffs and Appellants,

—VS.—

STATE OF MONTANA, *et al.*,

Defendants and Respondents,

LAKE SUPERIOR DISTRICT POWER COMPANY, *et al.*,

Plaintiffs and Appellants,

—VS.—

STATE OF MONTANA, *et al.*,

Defendants and Respondents.

MEMORANDUM OF PROCEEDINGS

Date	Memoranda	Minute Book	Costs
9/27/79	Notice of appeal (Count IV)		$20.00
9/28/79	Order per curiam. It is ordered that the appeal in this Cause is hereby consolidated with Cause No. 14982 with instructions (see order)		

District Court Order in the Consolidated Actions Dismissing Counts I-III of the Complaint— July 27, 1979

IN THE DISTRICT COURT OF THE
FIRST JUDICIAL DISTRICT OF THE STATE OF MONTANA
IN AND FOR THE COUNTY OF LEWIS AND CLARK

Nos. 42657, 42971, 43289

COMMONWEALTH EDISON COMPANY, *et al.*,

Plaintiffs,

—VS.—

STATE OF MONTANA, *et al.*,

Defendants.

Nos. 42689, 42972, 43288

LAKE SUPERIOR DISTRICT POWER COMPANY, *et al.*,

Plaintiffs,

—VS.—

STATE OF MONTANA, *et al.*,

Defendants.

ORDER

These cases are actions for refunds of coal severance tax paid by the plaintiffs pursuant to Chapter 35 of Title 15, M.C.A. The amounts were paid under protest and

this suit followed. Plaintiffs seek, also, declaratory and injunctive relief with respect to future installments of the tax.

The plaintiffs allege that they are eleven out-of-state public utilities operating in midwestern and southwestern states and several companies which mine coal in Montana and furnish the coal to the utilities pursuant to long-term contracts. The tax is imposed on the severance of coal from the ground and is measured by the "contract sales price" of the coal when prepared by shipment "F.O.B. the mine." In certain instances the value may be imputed as provided in Section 15-35-107, M.C.A. The rates vary, ranging up to 30% of the value.

In cause number 42657, plaintiffs seek to recover the first payment amounting to $7,019,705.16. With subsequent payments in causes number 42971 and 43289, the sums paid aggregate in excess of $27,000,000.00. The complaint of **[2]** Western Energy Company in causes 42689, 42972 and 43288 separately state its claim for refunds of a portion of the taxes paid and acknowledge that only a portion of its tax payments were made under protest.

The complaints consist of four counts. The fourth count, which asks for an injunction pendente lite to prevent the State from disbursing the taxes collected, has been severed as a separate cause of action and has been dismissed by this court.

The first three counts are considered here. The defendants have moved to dismiss each of the counts. Numer-

ous briefs have been filed and an oral hearing was had on the motion to dismiss. The defendants were represented by Attorney General Michael T. Greely, Assistant Attorneys' General Mike McGrath and Mike McCarter and by Ross Cannon. The plaintiffs were represented by Patrick F. Hooks and William R. Glendon. Western Energy Company was represented by John Carl.

The complaints set out the basic claims in three separate counts.

Count I asserts that the severance tax is unconstitutional in that it is an undue burden on interstate commerce in that the tax bears no fair relation to the services and protection provided by the State of Montana to the coal mining activity.

Count II asserts that the severance tax is unconstitutional because it violates the Supremacy Clause of the Federal Constitution in that it substantially frustrates the congressional intended purpose to increase coal production as a substitute for oil energy.

Count III asserts that the coal severance tax is unconstitutional because it grossly distorts the compromise between the federal government and the states expressed in the Mineral Lands Leasing Act of 1920 and as amended by the Federal Coal Leasing Amendments Act of 1975, by appropriating a major part of the "economic rents" attributable to coal extraction thus frustrating federal policies.

District Court Order in the Consolidated Actions Dismissing Counts I-III of the Complaint— July 27, 1979

To all three counts the defendants have filed motions to dismiss on the ground that the complaint fails to state claims upon which relief may be granted.

In considering a motion to dismiss the Court is guided by the rule that a motion to dismiss will not be granted unless, as a matter of law, no facts can be **[3]** proven that will establish that plaintiffs are entitled to the requested relief. *Buttrell v. McBride Land and Livestock,* 171 M 296 (1976). But whether a complaint states a cause of action must be determined from allegations of fact and not from conclusions. *Coldwater v. State Highway Commission,* 118 Mont. 65.

In the approach to the question, and for the purpose of the motion only, the Court accepts as true the well pleaded facts of the claim. *Potter v. Miller,* 145 M. 197.

COUNT I.

This count alleges that:

1. The Coal Severance Tax is imposed on activities which substantially affect interstate commerce, that it violates the Commerce Clause of the United States because the amount of the tax bears no fair relation to the cost of services and protection afforded by the state to taxpayers, and that it discriminates against interstate commerce.

For the purposes of the motion to dismiss the defendants admit the truth of the claim but contend that the

allegations are not sufficient to state a claim against the defendants upon which relief may be granted.

The issue to be decided as to Count I is the scope and reach of the Commerce Clause of the United States Constitution. The issue arises from the widely disparate views of the parties as to whether a local activity such as mining of coal, is subject to the exclusive jurisdiction of the state for tax purposes? Or whether that activity for tax purposes is subject to scrutiny under the Commerce Clause when it has a substantial effect on interstate commerce.

The basis for defendants' contentions is that the taxable event, the severing of coal from the ground, is not an act of commerce, but is a purely local activity which is not reached by the Commerce Clause. The defendants rely on United States Supreme Court case law which is based upon what has been labeled as the "Heisler Trilogy" case study of three United States Supreme Court decisions, namely *Heisler v. Thomas Colliery Co.*, 260 U.S. 235 (1922); *Oliver Iron Mining Co. v. Lord*, 262 U.S. 172 (1923) and *Hope Natural Gas Co. v. Hall*, 274 U.S. 284 (1927).

The plaintiffs here accept the reasoning of "Heisler Trilogy" and label the reasoning in those decisions as providing a "mechanical test" which does not apply **[4]** to the situation here, and as to which the United States Supreme Court no longer adheres.

The plaintiffs would characterize the "Heisler" rule as follows:

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"*Heisler* employed a mechanical test to determine whether an activity was inter*s*tate or intr*a*state commerce. The test simply required the Court to find a 'point of time when they (goods) cease to be governed exclusively by the domestic law and begin to be governed and protected by the national law of commercial regulation. . . .' *Heisler v. Thomas Colliery Co.*, 260 U.S. 245, 260-61 (1922). Under the reasoning of the *Heisler* Court, activities such as mining, manufacturing and agricultural production were on one side of this line and were thus said to be within the *exclusive* control of the state, and only the state could regulate or tax the activity. On the other side, the activity was *exclusively* within federal control. *Heisler's* mechanical test was perhaps most explicitly stated in *Carter v. Carter Coal Co.*, 298 U.S. 238, 303 (1936), where the Court used the test to strike down a federal law regulating mining activities:

> One who produces or manufactures a commodity, subsequently sold and shipped by him in interstate commerce, whether such sale and shipment were originally intended or not, has engaged in two distinct and separate activities. So far as he produces or manufactures a commodity, his business is purely local. So far as he sells and ships, or contracts to sell and ship, the commodity to customers in another state, he engages in interstate commerce. *In respect of the former, he is subject only to regulation by the state; in respect of the*

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latter, to regulation only by the federal government. (Emphasis supplied)

According to defendants, the *Heisler* trilogy cases are 'as valid today as they were when initially laid down.' (Tr. 7). They claim that, because of this mechanical test, the Coal Severance Tax is immune from any examination at all under the Commerce Clause (Tr. 17), without regard to the actual effect of the Tax on interstate commerce (Defendants' Reply Br. at 3), and that this would be so, even if the rate of tax were raised to 100% *ad valorem* (Tr. 84).

Plaintiffs take issue with these conclusions. They argue that the rationale of *Heisler* and like cases has been rejected and repudiated by later cases. (Plaintiffs' Br. at 22-35). They say that mining, manufacturing and agricultural production are not immune from Commerce Clause scrutiny. Plaintiffs trace an overall evolution in the development of the Commerce Clause since 1937, on the basis of which they argue that the breadth and scope of the Clause has expanded so that it now touches, and can be used to scrutinize for impermissible burdens, all activities which 'substantially affect' interstate commerce. Plaintiffs have further asserted that the Coal Severance Tax has such a 'substantial effect' on interstate commerce and is, therefore, subject to scrutiny.

Accordingly, the central issue before the Court is whether or not the 'mechanical test' of the *Heisler* trilogy has been retained by the Supreme Court's

> opinions since that time or has been supplanted, as the plaintiffs claim, by a 'substantial effects' test. The two tests are fundamentally different in several respects. The test which plaintiffs claim should be **[5]** employed gives an expansive reading to the Commerce Clause; it involves a judicial balancing and accommodation of the competing state and federal interests involved. The power of the states and the federal government necessarily overlap under this test. Defendants' test, on the other hand, gives a very narrow scope to the Commerce Clause, and it would make the powers of each government exclusive in its own domain."

It is the wish of this Court to examine the principal decisions of the Supreme Court since the "Heisler Trilogy" cases to determine if the Supreme Court has expanded the reach of the Commerce Clause to effect a control of the taxing authority of a state of a local activity.

Under the theory of the plaintiffs that the so-called "Mechanical Test" has been supplanted by "substantial effect on commerce" test this Court would necessarily have to deny the motion to dismiss and proceed to a factual determination.

The plaintiffs do not contend that the State may not tax an activity which has a substantial effect on interstate commerce. They do contend, however, that the tax has to bear a fair relationship to the cost impact such activity

has on the taxpayers of the state. If such be the law then a factual determination is necessary.

The parties disagree as to the interpretation of later Supreme Court decisions as to their effect on the *Heisler* rule.

1922

The taxable event in *Heisler v. Thomas Colliery Co.*, was anthracite coal mined, washed, screened or otherwise prepared for market. Over the contentions that Pennsylvania had a monopoly on anthracite coal which was a prime necessity of other states, and that the tax was a collection of tribute from other states, the Supreme Court held that the taxable event was not a regulation of commerce and was exclusively governed by domestic law and not governed and protected by the national law of commerce regulations until the goods commence their final movement for transportation from the state of their origin to that of their destination.

1923

The taxable event in *Oliver Iron Co. v. Lord, et al.*, was the occupation of those "engaged in the business of mining or producing iron ores or other ores." The chief contention was that mining, as conducted by the plaintiffs, if not actually a part of interstate commerce, was so closely connected therewith that to tax it is to burden or

interfere with such commerce, something a state cannot do under the **[6]** Commerce Clause of the United States Constitution.

As in the *Heisler* case, the argument was that the demand or market for the ore outside the state. The Supreme Court held that mining is not interstate commerce but, like manufacturing, is a local business subject to local regulation and taxation. Its characteristic in this regard is intrinsic, is not affected by intended use or disposal of the product, is not controlled by contractual engagements and persists even though the business be conducted in close connection with interstate commerce.

1927

The taxable event in *Hope Natural Gas Company v. Hall* was the business of producing natural gas in the state, upon which activity an "annual privilege tax" was assessed. The business was the production and purchase of natural gas in West Virginia, and the continuous and uninterrupted transportation of this through pipe lines to other states. The Supreme Court of the United States approved a lower court's decision that the value of the gas must be computed before it enters the stream of interstate commerce. It was admitted that there was no violation of the Commerce Clause when the state lays a privilege or occupation tax upon producers of natural gas reckoned according to the value at the well head, because production is a purely local activity.

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1933

The tax event in *Minnesota v. Blasius,* 290 U. S. 1 concerned the shipment of livestock to the St. Paul market. The Supreme Court held that while a state may not tax items in the current of interstate commerce yet under the facts the transportation had ceased and when Blasius received the cattle, put them in his own pens, where he could sell to buyers within or without the state, the "cattle were not held by him for the purpose of promoting their safe or convenient transit. They were not in transit. Their situs was in Minnesota where they had come to rest. There was no federal right to immunity from the tax."[1]

1936

Carter v. Carter Coal Co., 298 U.S. 238 concerned a Federal statute, the "Bituminous Coal Conservation Act of 1935." The question was whether the labor [7] provisions of the act could be upheld as an exercise of the power to regulate commerce. The thrust of the legislative averment was that production and distribution by producers of such coal bear upon and directly affect interstate commerce and render regulation of production and

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1 This case is corollary to the *Heisler* cases but instead of activity prior to entering the stream of interstate commerce is one in which interstate commerce had ceased.

distribution imperative for the protection of such commerce. The act was struck down when the court held:

> "One who produces or manufactures a commodity, subsequently sold and shipped by him in interstate commerce, whether such sale and shipment were originally related or not, has engaged in two distinct and separate activities. So far as he produces or manufactures a commodity, his business is purely local. So far as he sells and ships, or contracts to sell or ship, the commodity to customers in another state, he engages in interstate commerce. In respect to the former, he is subject only to the regulation by the state; in respect to the latter, to regulation only by the federal government. *Utah Power and Light Co. v. Pfost,* 286 U.S. 165, 182. Production is not commerce, but a step in preparation for commerce. *Chassaniol v. Greenwood,* 291 U.S. 584, 587."

1936

National Labor Relations Board v. Jones and Laughlin Steel Corporation, 301 U.S. 1. The involvement considered was a violation by Jones and Laughlin of the National Labor Relations Act by engaging in unfair labor practices affecting commerce. Section 10(a) of the act provided "The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce." The contention of *Jones-Laughlin* was that the act was

beyond the reach of Congress. The Supreme Court reasoned as follows:

> "The critical words of this provision, prescribing the limits of the Board's authority in dealing with the labor practices, are 'affecting commerce'. The Act specifically defines the 'commerce' to which it refers (§ 2(6)):
>
> "The term commerce means trade traffic, commerce, transportation, or communication among the several states, or between the District of Columbia or any Territory of the United States, and any State or other Territory, or between any foreign country and any State, Territory, or the District of Columbia or any Territory, or between points in the same State but through any other State or any Territory or the District of Columbia or any foreign country:
>
> "There can be no question that the commerce thus contemplated by The Act (aside from that within a Territory or the District of Columbia) is interstate and foreign commerce in the constitutional sense. The Act also defines the term 'affecting commerce' (§ 2(7)):
>
> "The term 'affecting commerce' means in commerce a burdening or **[8]** obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce.

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"This definition is one of exclusion as well as inclusion. The grant of authority to the Board does not purport to extend beyond the relationship between all industrial employees and employers. Its terms do not impose collective bargaining upon all industry regardless of effect upon interstate or foreign commerce. It purports to reach only what may be deemed to burden or obstruct that commerce and, thus qualified, it must be construed as contemplating the exercise of control within constitutional bounds. It is a familiar principle that acts which directly burden or obstruct interstate or foreign commerce, or its free flow, are within the reach of congressional power. Acts having that effect are not rendered immune because they grow out of labor disputes."

The Supreme Court held the act constitutional.

The plaintiffs here take the position that the Heisler Trilogy rule, although not specifically overruled by Jones and Laughlin, is overruled by implication. The defendants characterize the Jones and Laughlin decision as not applicable since it dealt with a situation in which Congress had acted, specifically enacting legislation applied to activities which "affect commerce", which is not the situation considered here.

1940

The event in *Sunshine Anthracite Coal Co. v. Adkins,* 310 U. S. 381 involved the Bituminous Coal Conservation

Act of 1937 which provided for regulation and sale of bituminous coal. The Act was upheld on the basis that the regulatory provisions of the Act were within the Commerce power; they apply only to sales or transactions in, or directly or intimately affecting, interstate commerce. The Sunshine Coal Company was the lessee of coal lands in Arkansas and was engaged in the business of mining and shipping coal. The Supreme Court held "The regulatory provisions are clearly within the power of Congress under the Commerce Clause of the Constitution; * * * The fixing of prices, the proscription of unfair trade practices, the establishment of marketing rules respecting such sales of bituminous coal constitute regulations within the competence of Congress under the Commerce Clause." This case is an outgrowth of *Carter v. Carter Coal Co.*, after the Act had been amended.

1941

The event in *United States v. Darby,* 312 U. S. 100 was the U. S. Fair Labor Standards Act of 1938 and its fixing of minimum wages and hours. The questions **[9]** presented were "first, whether Congress has constitutional power to prohibit the shipment in interstate commerce of lumber manufactured by employees whose wages are less than a prescribed minimum or whose weekly hours of labor at that wage are greater than a prescribed maximum, and second, whether it has the power to prohibit the employment of workmen in the production of goods for interstate commerce at other than prescribed wages and hours."

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As to the first question the Supreme Court held that "while manufacturing is not of itself interstate commerce, the shipment of manufactured goods interstate is such commerce and the prohibition of such shipments by Congress is indubitably a regulation of commerce."

As to the second question the Court held:

> "While this Court has many times found state regulation of interstate commerce, where uniformity of its regulation is of natural concern, to be incompatible with the Commerce Clause even though Congress has not legislated on the subject, the court has never implied such restraint on state control over matters of intrastate not deemed to be regulations of interstate commerce or its instrumentalities even though they affect the commerce. *Minnesota Rate Cases,* 230 U. S. 352, 398 et seq., and cases cited: 410 et seq., and cases cited. In the absence of congressional legislation on the subject laws which are not regulations of the commerce itself or its instrumentalities are not forbidden even though they affect interstate commerce. *Kidd v. Pearson,* 128 U.S. 1; *Bacon v. Illinois,* 227 U.S. 504; *Heisler v. Thomas Colliery Co.,* 260 U. S. 245; *Oliver Iron Co. v. Lord,* 262 U. S. 192.
>
> "But it does not follow that Congress may not by appropriate legislation regulate intrastate activities where they have a substantial effect on interstate commerce."

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The Supreme Court upheld the application of the Act's provisions.

1942

The event in *Wickard v. Filburn,* 317 U. S. 111 involved the U. S. Agricultural Adjustment Act of 1938. A farmer sought to enjoin enforcement against himself of the penalty imposed on that part of his 1941 wheat crop which was available for marketing in excess of the marketing quota established for his farm. His argument was that the marketing provisions of the act applicable to him were unconstitutional because not obtainable under the Commerce Clause. He urged that the marketing quotas were a regulation of production and consumption of wheat. (The excess wheat was grown for his own consumption.) The thrust of the opinion is that Congress has, under the Commerce Clause, the power to regulate local activity if such activity "exerts a **[10]** substantial economic effect on interstate commerce."

1943

The event in *Parker v. Brown,* 317 U. S. 341 involved the California Agricultural Prorate Act and whether it was rendered invalid under the United States Sherman Act or by the United States Agricultural Marketing Agreement Act of 1937. The declared purpose of the California Act was to "conserve the agricultural wealth of the State" and "to prevent economic waste in the market-

ing of agricultural products" of the State. The Supreme Court held that the California activity was not within the reach of the Commerce Clause and said:

> "This court has repeatedly held that the grant of power to Congress by the Commerce Clause did not wholly withdraw from the States the authority to regulate commerce with respect to matters of local concern, in which Congress has not spoken. (Citing cases) A fortiori there are many subjects and transactions of local concern not themselves interstate commerce or a part of its operation which are within the regulatory and taxing powers of the States, so long as state action serves local ends and does not discriminate against the commerce, even though the exercise of those powers may materially affect it. Whether we resort to the mechanical test sometimes applied by this Court in determining when interstate commerce begins with respect to a commodity grown or manufactured within a State and then sold and shipped out of it—or whether we consider only the powers of the state in the absence of congressional action to regulate matters of local concern, even though the regulation affects or in some measure restricts the commerce—we think the present regulation is within state power."

In reference to the "mechanical test", the Court went on to say:

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"But courts are not confined to so mechanical a test. When Congress has not exerted its power under the Commerce Clause, and state regulation of matters of local concern is so related to interstate commerce that it also operates as a regulation of that commerce, the reconciliation of the powers thus granted with that reserved to the state is to be attained by the accommodating of the competing demands of the state and the national interests involved."

1946

The event in *Nippert v. City of Richmond,* 327 U. S. 416 involved a municipal ordinance on persons engaged in the business of soliciting. The tax was struck down as violative of the Federal Commerce Clause because it had the possibility of discriminating between an "instate" and an out-of-state merchant. The Court said:

"There is no lack of power in the state or its municipalities to see that interstate commerce bears with local trade its fair share of the cost of local government, more especially in view of recent **[11]** trends in this field. *McGoldrick v. Berwind-White Co.,* supra. But this does not mean, and the trends do not signify, that the state or municipal governments may devise a tax applicable to all commerce alike, which strikes down or discriminates against large volumes of that commerce in order to reach other portions as to which the application of the tax

would produce no such consequences, or only negligible ones. Other types of tax are available for reaching both portions which do not involve the forbidden evils or the necessity for putting them upon some commerce in order to reach the other. The problem comes down therefore to whether the state or municipal legislative bodies in framing their tax measures to reach interstate commerce shall be at pains to do so in a manner which avoids the evils forbidden by the commerce clause and puts that commerce actually up on a plane of equality with local trade in local taxation, not as is said to a question of whether interstate trade shall bear its fair share of the cost of local government, the benefit and protection of which it enjoys on a par with local business."

"The tax here in question inherently involves too many probabilities, and we think activities, for exclusion of or discrimination against interstate commerce, in favor of local competing business, to be sustained in any application substantially similar to the present one."

The Court pointed out the artful method used by the taxing authorities to make such discrimination possible and condemned the use of a "local incident" to justify the discrimination. The Court said:

"If the only thing necessary to sustain a state tax bearing upon interstate commerce were to discover some local incident which might be regarded as

> separate and distinct from the transportation or intercourse which is the commerce itself and then lay the tax on that incident, all interstate commerce could be subjected to state taxation and without regard to the substantial effects of the tax upon commerce."

The plaintiffs here contend that this is the pronouncement of the Supreme Court which, in effect, overrules the Heisler cases. This Court does not so view the Nippert case. The *Nippert* case is squarely one of discrimination which is not the issue in the case under consideration here. It may be true that the tax adds to the cost of the coal to the ultimate consumers but there is no discrimination between out-of-state consumers and in-state consumers, insofar as the tax is concerned.

1948

The event in *Memphis Gas vs. Stone,* 335 U. S. 80 was a state franchise tax or excise tax on the value of capital used, invested or employed in Mississippi by the Memphis Natural Gas Co., whose business was exclusively interstate. Challenge was made as to the validity of the tax under the Federal Commerce Clause. The Supreme Court affirmed the Mississippi court upon the grounds that the tax was a recompense **[12]** for the state's protection of the petitioners local interstate activities.

The Court characterized the factual situation as follows:

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"The facts of this case present again the perennial problem of the validity of a state tax for the privilege or [sic], within a state, certain activities admittedly necessary to maintain or operate the interstate business of a taxpayer. * * * The states have sought by taxation to collect from the instrumentalities of commerce compensation for the protection and advantages rendered to commerce by state governments. The federal courts have sought over the years to determine the scope of a state's power to tax in the light of competing interests of interstate commerce, and of the states with their power to impose reasonable taxes upon incidents connected with that of commerce."

1954

The event in *Michigan-Wisconsin Pipe Line v. Calvert,* 347 U. S. 157 concerned two natural gas pipe line companies which carried on an interstate business and a tax levied not on the capture or production of the gas but rather on its taking into interstate commerce after production. The tax was declared invalid because it was the type of tax that could be levied by each state through which the pipe line ran and would in effect establish custom [sic] barriers that the Commerce Clause was designed to eliminate. The Court said:

"It is now well settled that a tax imposed on a local activity related to interstate commerce is valid if, and only if, the local activity is not such an integral part

of the interstate process, the flow of commerce, that it cannot be separated from it (citing cases). And if a genuine separation of the taxed local activity from the interstate process is impossible, it is more likely that other states through which the commerce passes or into which it flows can with equal right impose a similar levy on the goods, with the net effect of prejudicing or unduly burdening commerce."

"The problem in this case is not whether the State could tax the actual gathering of all gas whether it is transmitted in interstate commerce or not, cf. *Hope Natural Gas Co. v. Hall,* supra, but whether here the state has delayed the incidence of the tax beyond the step where productions have ceased and transmission in interstate commerce has begun."

1961

The event in *Alaska v. Artic Maid,* 366 U. S. 199 was a license tax on freezer ships of 4% of the value of salmon. Artic Maid used freezer ships for the taking and preservation of salmon along Alaska's shores. The salmon were caught off the coast of Alaska by boats which Artic Maid owns or had under contract and by independent fishermen who sell salmon to Artic Maid. The salmon are frozen when received **[13]** aboard the freezer ships, and eventually they are taken to the State of Washington, where they are canned. The Supreme Court held, as applied to salmon taken in Alaska's territorial waters, the

tax was not invalid as a burden on interstate commerce in violation of the Federal Constitution. (The measure of the tax is not the taxable event, 366 U. S. at 202.)

The Supreme Court said:

> "The process of gathering fish either through the catcher boats that are a part of respondent's fleet or through independent operators is a 'local activity' (*Michigan-Wisconsin Pipe Line Co. v. Calvert,* supra, 166) in a vivid sense of the term. We see no reason why our cases involving the taking of shrimp (*Toomer v. Witsell,* supra) and the exhaustion of ore (*Oliver Iron Mining Co. v. Lord,* 262 U. S. 172) are not dispositive of this controversy. The *Oliver Iron* case is indeed a first cousin of the present case. Here, as there, the tax is an occupation tax. Here as there, the market for the product obtained locally is interstate, the taking being a step in a process leading to an interstate Market."

1969

The event in *Dunbar-Stanley Studios, Inc. v. Alabama,* 393 U. S. 587 was a tax on photographers for each county, town or city where he operates. In the case of a photographer or gallery "at a fixed location" the maximum tax was $25.00 in largest cities. The tax was $5.00 per year for a transient photographer. The transient photographer contended that the Federal Commerce Clause barred the imposition of the transient

photographer's tax on its activities. The Supreme Court held that the tax was constitutionally permissible. The transient photographer's activities were limited to taking pictures at J. C. Penney's stores in Alabama and transmitting the exposed film to an office in North Carolina where the film was developed and finished and returned to the Penney stores in Alabama. The Court said:

> "It could hardly be suggested that if J. C. Penney had set up its own resident or transient photography studios, using its own employees, such a photography business would have been exempt from State taxation merely because it chose to send the exposed film out of the state for processing.
>
> "The extraction of a natural resource within a state is not immunized from state taxation merely because, once extracted, the product will be immediately shipped out of state for processing and sale to consumers. *Alaska v. Artic Maid,* supra, at 203-204; *Oliver Iron Mining Co. v. Lord,* 262 U. S. 172, 177-79 (1923 cf. *Toomer vs. Whitsell,* 334 U. S. 385, 394-395 (1948)."

1970

The event in *Pike v. Bruce Church, Inc.,* 397 U. S. 137 concerned the Arizona **[14]** Fruit and Vegetable Standardization Act which was designed to prevent deceptive packaging. The State issued an order prohibiting the company from shipping its cantaloupes outside the state

unless they were packed in containers in a manner approved. The Supreme Court held that the order burdens interstate commerce since the cantaloupes were destined to be shipped from Arizona to an ascertainable location in California immediately after harvest, and the application of the challenged statute would require an operation then conducted outside the state to be performed within the state so it could be regulated there. The act required that all cantaloupes grown in Arizona and offered for sale must be packed in regular compact arrangements in closed standard containers approved by the supervisors.

The Court said:

> "Although the criteria for determining the validity of state statutes affecting interstate commerce have been variously stated, the general rule that emerges can be phrased as follows: Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits."

1976

The event in *National League of Cities v. Usery,* 426 U. S. 833 involved the Federal Fair Labor Standards Act which in 1974 was amended so as to extend the Act's minimum wage and maximum hour provisions to almost all employees of states and their political subdivisions.

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The Court held the amendments not within the authority of Congress granted by the Commerce Clause. The Supreme Court overruled the language in *Wirtz* (421 U. S. 548) as follows:

> " '[We] look to activities in which the states have habitually engaged as marking the boundary of restriction upon the federal taxing power. But there is no such limitation upon the plenary power to regulate commerce. The state can no more deny the power if its exercise has been authorized by Congress than can an individual.' "

The opinion then went on as follows:

> "But we have reaffirmed today that the States as States stand on quite a different footing from an individual or corporation when challenging the exercise of Congress' power to regulate commerce. We think the dicta from *United States v. California,* simply wrong. Congress may not exercise that power so as to force directly upon the State its choices as to how essential decisions regarding the conduct of integral governmental functions are to be made. We agree that such assertions of **[15]** power, if unchecked, would indeed, as Mr. Justice Douglas contended in his dissent in *Wirtz,* allow 'the National Government [to] devour the essentials of state sovereignty.' "

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1976

The event in *Great Atlantic & Pacific Tea Co. v. Cottrell,* 324 U. S. 277 involved a Mississippi regulation that milk and milk products from another state may be sold in Mississippi only if the other state accepts milk and milk products produced in Mississippi on a reciprocal basis. The regulation was challenged on the basis that it violated the Federal Commerce Clause. A District Court holding the regulation valid as an exercise of the State police powers even though it incidentally burdened interstate commerce, was reversed by the U. S. Supreme Court. The Court ruled that this regulation was mandatory and presented a situation where "burden imposed on [interstate] commerce is clearly excessive in relation to the putative local benefits."

1977

The event in *Complete Auto-Transit v. Brady,* 430 U. S. 274 involved a Mississippi tax on the privilege of doing business in the state. The opinion commenced with the following language:

> "Once again we are presented with 'the perennial problem of the validity of a state tax for the privilege of carrying on, within a state, certain activities related to a corporation's operation of an interstate business.' "

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The taxes in question were sales taxes assessed to a Michigan corporation engaged in the business of transporting motor vehicles by motor carrier for General Motors Corporation. The tax was upheld by the Supreme Court.

The Supreme Court rejected the rule of *Spector Motor Service, Inc. v. O'Connor* that a state tax on the "privilege of doing business" is per se unconstitutional when it is applied to interstate commerce. The Court adopted the language of *Western Livestock v. Bureau of Revenue,* 303 U. S. 250 (1938) as follows:

> "It was not the purpose of the Commerce Clause to relieve those engaged in interstate commerce from their just share of State tax burden even though it increases the cost of doing business."

The Court commented on the *Spector* rule as follows:

> "This rule looks only to the fact that the incidence of the tax is 'the privilege of doing business'; it deems irrelevant any consideration of the practical effect of the tax."

[16] On the basis that interstate commerce must pay its way, the Court approved the rule "that net income from the interstate operations of a foreign corporation may be subject to state taxation provided the levy is not discriminatory and is properly apportioned to local activities within the State forming sufficient nexus to support the tax."

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1977

The event in *Philadelphia v. New Jersey,* 437 U. S. 617 was a New Jersey statute which prohibited the importation of solid or liquid waste which was originated or collected outside the state. It was argued that there was no commerce because the waste was valueless. The Court held that all objects of interstate trade merit Commerce Clause protection and none is excluded from the definition at the outset. The Court held that "Congress has power to regulate the interstate movement of these wastes, states are not free from Constitutional scrutiny when they restrict that movement."

1978

The event in *Department of Revenue of Washington v. Association of Washington Stevedoring Companies,* 435 U. S. 734 was a business and occupation tax taxing the interstate activity of stevedoring within the State. It was pointed out that stevedoring is essentially a part of interstate commerce and since there was no showing that, under the *Complete Auto* reasoning, the tax was discriminatory, or did not have sufficient nexus to the state, was not fairly apportioned or fairly related to services provided by the State, the tax was upheld.

1979

The event in *Hughes v. Oklahoma,* ____ U. S. ____, decided April 24th, involved an Oklahoma statute prohib-

iting the transportation or shipping for sale natural minnows from the waters of Oklahoma to points outside the state. The Supreme Court held that the statute discriminates against interstate commerce and blocked the flow of commerce at the state's border. The Supreme Court overruled *Geer v. Connecticut,* 161 U. S. 519 (1896) upholding the right of Connecticut to prohibit the exportation of game birds killed within the state on the ground that the birds never entered the stream of commerce and that therefore only internal commerce, rather than interstate commerce, was affected by the statute. The Court said:

> **[17]** "The fiction of state ownership may no longer be used to force those outside the State to bear the full costs of 'conserving' the wild animals within its borders when equally effective nondiscriminatory measures are available."

The Supreme Court cases decided since the *Heisler, Oliver* and *Hope* cases appear to this Court to be, depending upon the activity involved, properly allocated in four categories, to-wit: (1) When Congress has asserted its regulatory powers under congressional acts[1]; (2) When the state engages in regulatory activity of interstate com-

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1 National Labor Relations Board v. Jones and Laughlin Steel Corp. (supra); Wickard v. Filburn (supra); National League of Cities v. Usery (supra); United States v. Darby (supra); Sunshine Anthracite Coal Co. v. Adkins (supra); Carter v. Carter Coal Co. (supra); Parker v. Brown (supra).

merce[2]; (3) When the state imposes a tax on interstate commerce activity[3]; (4) When the state imposes a tax on an activity which is not in commerce[4]. The thrust of the plaintiffs' argument is that there is but one definition of commerce and that the Commerce Clause involves and authorizes congressional action, an affirmative effect and a restriction on state activities, a negative effect. It is contended that any activity which "substantially affects" commerce is subject to the scrutiny and the reach of the Federal Commerce Clause.

Since our present economy involves inter-relationships between the local and national level, it is difficult to conceive of any activity which does not have some effect on interstate commerce and thus, if the plaintiffs' position is correct we do have a situation in which the control of all activities is within the umbrella of the Federal Commerce Clause, whether it be by affirmative application or negative application. The plaintiffs, however,

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2 Pike v. Bruce Church, Inc. (supra); Great Atlantic & Pacific Tea Co. v. Cottrell (supra); Philadelphia v. New Jersey (supra); Hughes v. Oklahoma (supra).

3 Nippert v. City of Richmond (supra); Memphis Gas v. Stone (supra); Michigan-Wisconsin Pipe Line v. Calvert (supra); Complete Auto-Transit v. Brady (supra); Spector Motor Service, Inc. v. O'Connor (supra); Dept. of Revenue of Washington v. Association of Washington Stevedoring Companies (supra); Dunbar-Stanley Studios, Inc. v. Alabama (supra).

4 Heisler v. Thomas Colliery Co. (supra); Oliver Iron Co. v. Lord (supra); Hope National Gas Co. v. Hall (supra); Alaska v. Artic Maid (supra); Minnesota v. Blasius (supra).

contend that only those local activities which have a "substantial" effect on commerce are within the reach.

It is the opinion of this Court that the United States Supreme Court has not **[18]** adopted the view of the plaintiffs and that insofar as the negative effect on local activities the Supreme Court is still adhering to the threshold question as to whether the local activity is an act of commerce. The so-called "mechanical test" of the Heisler cases has been followed as recently as 1961 and 1969. (*Alaska v. Artic Maid* (supra) and *Dunbar-Stanley Studios, Inc. v. Oklahoma* (1969)).

However, when a state imposes a tax on interstate commerce as demonstrated by the cases cited in Note 3, the Supreme Court has fashioned a rule that is premised on the idea that activities of interstate commerce must bear a fair share of the burden upon a state because of such activity. If the tax (under the cases under Note 3) has a substantial effect on interstate commerce it will be upheld if (a) the tax is applied to an activity with a substantial nexus with the taxing state; (b) is fairly apportioned; (c) does not discriminate against interstate commerce and (d) is fairly related to the services provided by the state.

The plaintiffs assert that this rule applies here. This Court does not agree. The application of this rule would assume that the event here affects commerce within the purview of the cases cited under Note 3. Such is not the effect of those cases for in those cases there was no

question but that the tax was on an "interstate commerce" activity while here the tax can not be said to be an interstate commerce activity. To extend the rule of the cases of Note 3 to the tax here would, in the opinion of this Court, not be warranted and would be contrary to the cases of Note 4.

Since Congress has not asserted its commerce power as demonstrated by cases under Note 1 and since the tax here is in no sense regulatory as demonstrated by cases under Note 2 there is no further need to discuss them.

The plaintiffs contend that the Montana Coal Severance Tax is discriminatory. This contention is not tenable since the tax is imposed on the coal that is produced in the state by Montana or out-of-state companies, without regard to its consumption either in Montana or out of Montana.

It is the opinion of this Court that the complaint after application of the law as decided by the Supreme Court of the United States does not state a cause of action as to which the relief sought may be obtained.

The motion to dimiss Count One of the complaint is granted.

[19] *COUNT II.*

Count II alleges that Congress has enacted legislation which encourages the use of coal to meet the nation's energy requirements and that the Coal Severance Tax

substantially frustrates and impairs fulfillment of these national policies.

The complaint alleges that the tax is unconstitutional under the Supremacy Clause of the United States (ARTVI) which, in part, reads as follows:

> "This constitution and the laws of the United States which shall be made in pursuance thereof * * * shall be the supreme law of the land * * *."

The thrust of plaintiffs' allegations is that the tax increases the cost of Montana coal and thus lessens the possibility of its use as a substitute for oil.

The defendants contend in support of their motion to dismiss that before reliance may be had under the Supremacy Clause of the Federal Constitution there must be allegations as to a conflict between the state law and specific federal statutes or regulations.

The plaintiffs contend that it is not necessary that there be a direct and specific conflict between state and federal statutes and that allegations of "substantial frustration" are sufficient.

The issue necessarily involves the congressional enactments and the congressional intent as to whether the congressional enactments have precluded the states from imposing a severance tax on mining activities within its borders.

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The Court has heretofore asked the parties to submit to the Court the items bearing on the question, and as to which this Court can judicially notice, and therefrom make a determination as a matter of law as to whether the complaint states a cause of action upon which the relief sought may be had.

A review of the items submitted by the parties discloses a deep concern by the Executive and by Congress as to the world-wide oil situation.

Facing Congress were problems of readjustment of energy use, shifting from less dependence on oil and natural gas and more dependence on coal. While oil was plentiful the nation was using oil in home heating, manufacturing, production of electricity and transportation. The Congress had theretofore concerned itself with air quality and had enacted legislation to achieve a better national air quality and the use of coal to supply energy presented the problem of air quality being lowered. **[20]** Congress took note of the fact that, for air quality, low sulfur coal would produce less air contamination. Western coal, as compared to midwestern and eastern coal was of less sulfur content. However the greater use of western coal and lesser use of midwestern and eastern coal would cause economic problems in the midwest and the east. To achieve the goals of the Congress, it enacted statutes which would act as incentives to promote the use of coal and other non-oil based forms of energy. The statutes are as follows:

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Power plant and Industrial Fuel Use Act of 1978
Pub. Law No. 95-620, 92 Stat. 3289

Natural Gas Policy Act of 1978
Pub. Law No. 95-621, 92 Stat. 3350

Energy Conservation and Production Act
Pub. Law No. 94-385, 90 Stat. 1125

Energy Policy and Conservation Act of 1975
Pub. Law No. 94-163, 89 Stat. 871

Federal Non-Nuclear Energy Research and Development Act of 1974
Pub. Law No. 94-577, 88 Stat. 1878

Energy Reorganization Act of 1974
Pub. Law No. 93-438, 88 Stat. 1233

Energy Supply and Environmental Coordination Act of 1974
Pub. Law No. 93-319, 88 Stat. 246

Emergency Petroleum Allocation Act of 1973
Pub. Law No. 93-159, 87 Stat. 627

Clean Air Amendments of 1970
Pub. Law No. 91-604, 84 Stat. 1676

This Court, therefore, for the purposes of the motion to dismiss finds the activity of Congress directed toward incentives to use coal as a substitute for the use of oil.

Plaintiffs contend that the tax "substantially frustrates and impairs" the goals of the national policy and seeks to

present economic evidence which they contend will demonstrate that the Montana tax will lessen the use of coal and therefore "frustrate" the national policy.

The defendants contend that the preemptive force of the national coal policies are in the first instance a matter of law which must be established by reference to federal statutes and legislative history. With this position the Court agrees. The defendants contend that there is no national policy which requires the **[21]** limitation or elimination of state coal severance taxes and that the economic effect on the price of coal is irrelevant.

The United States Supreme Court has dealt with the Supremacy Clause application to factual situations. The criteria has been stated in various words some of which could be said not consistent with the others depending upon the use of words to the facts involved.

In *Farmers Education & Coop Union v. W. Day, Inc.*, 360 U.S. 525 (1959) the court said:

> "A determination of suppression of state law rests on legal and political presuppositions which should be made explicit and not left clouded. States should not be held to have been ousted from power traditionally held in the absence of either a clear declaration by Congress that it intends to forbid the continued functioning of the state law or an obvious and unavoidable conflict between the federal and state directives."

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In *City of Burbank v. Lockheed Air Terminal,* 411 U.S. 524 (1973) the court said:

> "Our prior cases on pre-emption are not precise guidelines in the present controversy, for each case turns on the peculiarities and special features of the federal regulatory scheme in question * * * Control of noise is of course deep-seated in the police power of the State. Yet the pervasive control vested in EPA and in FAA under the 1972 Act seems to us to leave no reason for local curfews or other local controls * * *"

In *DeCanas v. Bica,* 424 U.S. 351 (1976) the court said:

> "Of course, even state regulation designed to protect vital state interests must give way to paramount federal legislation. But we will not presume that Congress, in enacting the INA, intended to oust state authority to regulate the employment relationship covered by § 2805(a) in a manner consistent with pertinent federal law. Only a demonstration that complete ouster of state power—including state power to promulgate laws not in conflict with federal laws—was 'the clear and manifest purpose of Congress' would justify that conclusion."
>
> * * *
>
> "Respondents have not made that demonstration. They fail to point out, and an independent review

does not reveal any specific indication in either the wording or the legislative history of INA that Congress intended to preclude even harmonious state regulation touching on aliens in general or the employment of illegal aliens in particular."

[22] In *Hines v. Davidowitz,* 312 U.S. 52 (1941) the court said:

> "This Court, in considering the validity of state laws in the light of treaties or federal laws touching the same subject, has made use of the following expressions: Conficting; contrary to; occupying the field; repugnance; difference; irreconcilability; inconsistency; violation; curtailment; and interference. But none of these expression provides an infallible constitutional test or an exclusive constitutional yardstick. In the final analysis, there can be no one crystal clear distinctly marked formula.
>
> "In general, the states may exercise any power possessed by them prior to the adoption of the Constitution unless the exercise of such power is expressly or by necessary implication prohibited thereby or interferes with some power delegated to the United States."

In *McGoldrich v. Gulf Oil Corp.,* 309 U.S. 414 (1940) the City of New York levied a sales tax on the sale of fuel oil manufactured in New York City from crude petroleum, which had been imported from a foreign country to

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New York and there sold and delivered as ship's stores to vessels engaged in foreign commerce. The Gulf Oil Corporation contended that the New York statute conflicted with Section 630 of the Revenue Act of 1932, aided by amendments of June 16, 1933, 48 Stat. 256, declaring "that no tax under § 601 shall be laid 'upon any article sold for use as fuel supplies, ship's stores . . . on vessels . . . actually engaged in foreign trade.' " The Court said "The Congressional regulation, read in the light of its purpose is tantamount to a declaration that in order to accomplish constitutionally permissible ends, the import merchandise shall not become a part of the common mass of taxable property within the state, pending its disposition as ship's stores and shall not become subject to the state taxing power." * * * The state tax in the circumstances must fail as an *infringement of the congressional regulation of commerce.*" (emphasis supplied)

The United States Supreme Court held in the case of *McCulloch v. Maryland,* 17 U.S. (4 Wheat) 316 (1819) (the landmark decision establishing the supremacy rule) that Congress, when acting within its constitutional limits, has supremacy over states. However such supremacy must occur in the enactment of laws which the U.S. Constitution gives Congress the power to enact. Here no challenge has been made as to whether in the energy acts of the U.S. Congress is within the Congressional granted power. The principle cases relief [sic] upon by plaintiffs and the use of the Supremacy Clause involve specific grants of power to the Congress, **[23]** namely, Federal Regulation of Immigration—Federal power to levy and

collect taxes—Federal power to regulate Interstate Commerce—Federal power to borrow money—Federal power to establish Uniform Bankruptcy laws—Federal Indian jurisdiction.

Assuming the energy policy acts are something more than incentive legislation and are within the grant of power to the United States Congress it appears from the United States Supreme Court decisions that there are generally three situations for the pre-emption of state action:

(1) Where Congress has expressly prohibited state action. The items judicially noticed as supplied by the parties in no instance prohibit the states from its taxing authority.

(2) Where Congressional action clearly and unmistakeably shows the intent of Congress to prohibit state action. Here none of the items considered show such clear and unmistakeable intention.

(3) Where a state statute conflicts with a federal enactment and stands as a direct obstacle to its execution.

Plaintiffs concede that national policies must be determined by examining federal statutes, together with appropriate "legislative history, committee reports, administrative statements, regulations and the like." The scope and substance of national policies are matters of statutory interpretation. The types of "evidence" which form the

basis for statutory interpretation are matters of law and do not require the taking of testimony. For purposes of a motion to dismiss a court is not required to accept plaintiffs' allegations of law and legal conclusions are true. *Newport News Shipbuilding & Dry Dock Co. v. Schauffler,* 303 U.S. 54, 57 (1938); *Mitchell v. Archibald & Kendall, Inc.,* 573 F.2d 429, 432 (7th Cir. 1978); *Kadar Corp. v. Milbury,* 549 F.2d 230, 233 (1st cir. 1977); *Blackburn v. Fisk University,* 443 F.2d 121, 124 (6th Cir. 1971).

In the case of the Clean Air Act Amendments of 1977, the specific provisions of the Act, along with legislative history, demonstrate that the Congress favored and intended to encourage production and use of high-sulfur Eastern and Midwestern coal at the expense of low-sulfur Western coal. The legislative history reflects to an extent Congressional dissatisfaction with the use of low-sulfur Western coal to meet air emission standards. House and Conference Committee reports further reflect a Congressional intent to (1) reduce reliance upon Western coal and (2) promote expanded use of high-sulfur Eastern and Midwestern coal. Low-sulfur Western coal was **[24]** relegated a more limited role, to be used principally by existing facilities for which technological upgrading of air pollution control equipment is unfeasible or impractical. Specific provisions were enacted to implement those proposals, the most important of which are found in 42 U.S.C. §§ 7411 and 7425.

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Section 7411, as amended in 1977, has the effect of preventing specified new fossil fuel fired stationary sources from meeting air pollution emission standards by merely burning untreated low-sulfur coal. It requires "application of the best technological system of continuous emission reduction" for all new stationary sources. Thus, new sources using low sulfur coal must further reduce already low sulfur emissions by utilizing the best available anti-pollution equipment and techniques. The intent of Congress in adopting this requirement is expressed in the House Report: (*Congressional and Administrative News* 95th Congress, 1977 Session, Vol. II, pp. 1245.)

> "Actually, the committee has designed this proposal to strengthen demand for and use of this Nation's abundant supply of coal. The prevention of significant deterioration policy combined with section *111* revision of existing new source performance standards (to require new major pollution sources to use best technological system of continuous emission reduction [considering costs, energy, et cetera]') will help strengthen incentives for new plants to use locally available coal plus best available control technology. As EPA's 'Preliminary Economic Analysis . . .' (pp. 1-3 and V-6) concluded: 'Therefore, some plants especially those in the Midwest, which formerly were planning to import western low-sulfur coal in order to meet the requirements of the Clean Air Act will find it more economical to use local

high-sulfur coal and install a scrubber. As a result, the demand for Midwestern coal will increase by 25 million tons or by 20 percent.

Present new source performance standard regulations do not require use of any pollution control technology when a source burns very low-sulfur coal. While this promotes the use of low-sulfur coal and drives up the price of the coal, it means that billions of tons of medium and high-sulfur coal (located predominantly in the Midwestern and Eastern United States) remain in the ground, unmined."

Section 7425, as amended, has a similar purpose. See "The Clean Air Act Amendments of 1977: A Selective Legislative Analysis", 13 Land and Water L.R. 747, pp. 800-812. It grants the Governor of an affected state, the Environmental Protection Agency, and the President authority to prohibit a major fuel burning stationary source "from using fuels other than locally or regionally available coal or coal derivatives to comply with implementation plan requirements." This **[25]** prohibition may be effected upon a finding that the action "is necessary to prevent or minimize significant or regional economic disruption or unemployment . . ."

Thus, the specific provisions of the Act, along with accompanying legislative history, show a continued Congressional consideration for the regional interests of the Midwestern and Eastern states, and specifically for use of

high-sulfur Midwestern and Eastern coal at the possible expense of the use of low-sulfur Western coal.

Similarly, a look at the provisions of the "Energy Policy and Conservation Act of 1975" and its legislative history reveals no clear national policy demanding the use of Montana coal. 42 U.S.C. 6201 provides:

"The purposes of this chapter are—

(1) to grant specific stand-by authority to the President, subject to congressional review, to impose rationing, to reduce demand for energy through the implementation of energy conservation plans, and to fulfill obligations of the United States under the international energy program;

(2) to provide for the creation of a strategic Petroleum Reserve capable of reducing the impact of severe energy supply interruptions;

(3) to increase the supply of fossil fuels in the United States, through price incentives and production requirements;

(4) to conserve energy supplies through energy conservation programs, and, where necessary, the regulation of certain energy uses;

(5) to provide for improved energy efficiency of motor vehicles, major appliances, and certain other consumer products;

(6) to reduce the demand for petroleum products and natural gas through programs designed to pro-

vide greater availability and use of this Nation's abundant coal resources; and

(7) to provide a means for verification of energy data to assure the reliability of energy data.

Initially, a reading of this Act shows that it is not limited to coal. Section 6201(3) sets out a statement of policy encouraging increased production of all domestic "fossil fuels."

Further, the Act provides specific methods for implementation of its general statements of policy. Among the methods adopted are incentives for development of underground coal mines, 42 U.S.C. § 6211; provision for export restrictions, 42 U.S.C. § 6212; and the creation of a strategic coal and other fossil fuel reserves, 42 U.S.C. § 6231 et seq. None of the methods adopted prohibit state severance taxes or nullify other state and federal regulations, taxes or policies which may increase costs of coal production and use.

[26] Reference to other federal statutes dispels any notion that in establishing domestic energy policies, Congress intended to nullify other national, state, local or individual policies or interests which may increase the costs of coal production and use. For example, miners of low-sulfur coal are not exempted from costly environmental strip mining regulations, see 42 U.S.C. §§ 1251 et seq., nor are they exempted from health and safety requirements under the "Federal Coal Mine Health and

Safety Act", 30 U.S.C. § 801 et seq; nor from royalties payable under the Mineral Lands Leasing Act of 1920, as amended, 30 U.S.C. § 181, et seq. Moreover, Congressional findings in the "Surface Mining Control and Reclamation Acts of 1977", 30 U.S.C. §§ 1201 et seq., indicate a congressional preference for underground coal mining, contradicting any argument that Congress intended to promote strip mining of low-sulfur coal, in Montana or elsewhere, to the exclusion of environmental and other concerns.

Federal energy and environmental legislation is ultimately an amalgam of competing and often conflicting policies and interests; it is the product of compromise. The specific enactments of Congress fix the points of compromise and nothing in the statutes to which this Court's attention has been directed supports plaintiffs' contention that Congress intended to preempt state tax powers over coal or that a state tax is an obstacle to congressional policy because it increases coal costs.

If Congress intended to preempt the states' power to impose a tax on mining activity, and had the power to do so, it did not. A state tax is not an "obstacle" to federal policy in a constitutional sense merely because it increases the cost or price of a product, the use of which Congress encourages or favors.

The recent case of *Exxon v. Governor of Maryland,* 432 U.S. 117 (1978) summarily rejected a contention that broad, general national policy can preempt state laws which have some sort of indirect economic effect upon

the policy. In *Exxon,* plaintiffs claimed that a state statute prohibiting producers or refiners of petroleum products from operating retail service stations was invalid. They asserted that the law was anti-competitive and therefore conflicted with a national policy favoring "free competition":

> "Appellants point out . . . the . . . basic national **[27]** policy favoring free competition, and argue that the Maryland statute 'undermines' the competitive balance that Congress struck between the Robinson-Patman and Sherman Acts. This is merely another way of stating that the Maryland statute will have an anti-competitive effect. In this sense, there is a conflict between the statute and the central policy of the Sherman Act—our 'charter of economic liberty.' *Northern Pacific R.R. Co. v. United States,* 356 U.S. 1, 4, 2 L.Ed.2d 545, 78 S.Ct. 514. Nevertheless, this sort of conflict cannot itself constitute a sufficient reason for invalidating the Maryland statute. For if any adverse effect on competition were, in and of itself, enough to render a state statute invalid, the States' power to engage in economic regulation would be effectively destroyed. We are, therefore, satisfied that neither the broad implications of the Sherman Act nor the Robinson-Patman Act can fairly be construed as a congressional decision to preempt the power of the Maryland Legislature to enact this law. (Emphasis added). 432 U.S. at 133-134.

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In the context of state tax powers, the United States Supreme Court has rejected arguments that an occupation tax upon an exchange broker dealing in foreign currency indirectly burdens foreign commerce, *Nathan v. Louisiana,* 8 Howard 73, 12 L.Ed. 995 (1850); it has consistently rejected attacks upon nondiscriminatory state taxes which have some indirect rather than direct effect upon interstate commerce, e.g., *McGoldrich v. Berwind-White Coal Mining Co.,* 309 U.S. 33, 45-49 (1940); it has refused to extend federal sovereign immunity from state taxation to third parties even where the tax in question is ultimately borne by the United States, *United States v. Boyd,* 378 U.S. 39 (1964); it has rejected arguments that state taxation of property conflicts with federal taxing power because the tax may effectively destroy the property and therefore destroy a potential subject of federal taxation, *A. Magnano Co. v. Hamilton,* 292 U.S. 40 (1934); and it has upheld a nondiscriminatory gross receipts tax on an off-reservation resort operated by an Indian tribe against an argument that federal law prohibits every state tax which touches or affects a tribal enterprise. *Mescalero Apache Tribe v. Jones,* 411 U.S. 145 (1973). In each of these cases the Supreme Court has deemed the amount and ultimate impact of the challenged tax irrelevant under the Supremacy Clause.

> "* * * It cannot be that a state tax which remotely affects the efficient exercise of a federal power is for that reason alone inhibited by the Constitution. To hold that would be to deny to the States all power to tax persons or property. Every tax levied by a State

withdraws from the reach of federal taxation a portion of the property from which it is taken, and to that **[28]** extent diminishes the subject upon which taxes may be laid. The States are, and they must ever be, co-existent with the National Government. Neither may destroy the other. Hence the Federal Constitution must receive a practical construction. Its limitations and its implied prohibitions must not be extended so far as to destroy the necessary powers of the States, or prevent their efficient exercise."

Union Pacific R. R. Co., v. Peniston, 85 U. S. 3,30-31 (1973): The principles of *Union Pacific* were restated in *Penn Dairies, Inc., v. Milk Control Commission of Pennsylvania,* 318 U.S. 261 (1943), which concluded:

> "An unexpressed purpose of Congress to set aside statutes of the states regulating their internal affairs is not lightly to be inferred and ought not to be implied where the legislative command, read in the light of its history, remains ambiguous. * * *" (footnotes omitted)

This Court is of the opinion, as a matter of law, that Congress has not and did not intend to preclude the State of Montana from imposing a tax on the mining activities within the state. The allegations of Count II of the complaint, in the light of the Congressional intent, are insufficient to state a cause of action.

The motion to dismiss Count II of the complaint is granted.

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COUNT III.

The plaintiffs assert in Count III that the Coal Severance tax is invalid in that it "grossly distorts" the compromise between the Federal government and the states, expressed in the Mineral Lands Leasing Act of 1920 Pub. Law No. 146, 41 Stat. 437, as amended by the Federal Coal Leasing Amendment Act of 1975 Pub. Law No. 94377, 90 Stat. 1083 by appropriating directly to Montana a major part of the "economic rents" attributable to the exhaustion of federally-owned coal and thus frustrate the federal policies established by these policies.

The parties, pursuant to the Court's request, have submitted to the Court items of which the Court may judicially notice bearing on Congressional action and the legislative history.

The history of the legislation discloses a difference of opinion as to the production of coal in government lands.

The opinion of many of the Western congressmen was that instead of a leasing system, that the lands be sold to private interests or to the states. The opponents **[29]** of this view held that the coal producing lands should be retained by the United States under a leasing system.

The opposing views were expressed as follows:

> H.R.Rep. No. (668 Part 2) 63 Congress 2nd Session 6 (1914)
>
> "No matter how loudly and vigorously and repeatedly it may be proclaimed that these lands 'belong to all the people,' the fact remains that when

those States were admitted to the Union the United States Government entered into a solemn compact with each of them that the lands within their borders should be expeditiously and in an orderly manner disposed of to the settlers and be allowed to go into private ownership to help maintain the State government; and Congress has no moral, legal, or constitutional right to repudiate or violate that agreement—much less to wantonly impose excise duties upon our development."

Similarly, H.R.Rep. No 17 (Part 2), 64th Congress, 1st Session 8 (1916) (minority views) (Tab 33) states:

"The West is new and poor, and it is absolutely wrong for Congress to force the West to help support the East—at the same time depriving the West of many of its greatest sources of revenue by permanently withdrawing them from entry and preventing them ever going into private ownership and becoming subject to taxation for State and local governments. But, harsh as it is, it is not so much the disposition of the funds that we object to, as it is the permanent withdrawal from entry of these enormous resources, and the perpetual bureaucratic domination that will be exercised from Washington in their administration and control. It is the violation of what we deem are the inherent and equal rights of our Western States as sovereign States.

"Aside from the purely material questions involved there are those which go to the very founda-

tion, the very fundaments, of our form of government.

* * *

"Such legislation as is now proposed inevitably leads to an undermining of the sovereignty of the State; to a weakening of its power to sustain itself; to a confiscation of a part of the fruits of its natural resources; to a withholding of those resources from the possibility of taxation, thus increasing the burdens upon all other property within the State."

This was the background against which the compromise embodied in the 1920 Act was reached. The debate was firmly resolved in favor of retaining federal ownership in these mineral lands, for the benefit of the citizens of the entire country. Thus, Section 2 of the 1920 Act establishes a leasing program under the auspices of the Secretary of the Interior. (41 Stat. 438 § 2) The Act authorizes the Secretary to offer the coal lands of the United States for leasing, not for sale, and to award leases on such land on terms which he prescribes.

The Act also adopted a revenue sharing plan, whereby the states in which the **[30]** coal mining occurred would receive 37½% share of the rents and royalties derived by the federal government from the leasing system, to be used for the construction of public roads and schools (52½% of the revenues were assigned to a Reclamation Fund to reclaim the lands of the West; the remaining 10% went to the U. S. Treasury). *Mineral Lands Leasing Act*

of 1920, Ch. 85 § 35, 41 Stat. 450. This is the principal mechanism by which the states and the Nation were to divide the proceeds from this mineral wealth which had been reserved to the Nation as a whole.

The *Federal Coal Leasing Amendments Act of 1975* increased from 37½% to 50% the amount of federal royalty revenues which would be rebated to the states under the 1920 Act (Pub. L. No. 94-377, § 9(a)) and increased the minimum coal royalties on federally owned coal from five cents per ton to 12½% of the value of the coal mined (Pub. L. No. 94-377, § 7(a)) (Tab 35). The Amendments also permitted the states to spend their increased share of the royalties for purposes other than the construction and maintenance of public roads and the support of public schools. (Pub. L. No. 94-377, § 9(a)). See also H.R.Rep. No. 94-681, 94th Cong., 2nd Session (1976). With these exceptions, the 1975 Amendments continued the federal policies established by the 1920 Act and alleged in the complaint—the federal government was to continue to retain ownership of the coal lands, lease the mineral rights to private interests, and share the "economic rents" with the states in the proportion provided by the statute.

The plaintiffs contend that implicit in the compromise is a limitation on the States right to tax no further than the states legitimate needs.

The defendants contend as follows:

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Although the Mineral Lands Leasing Act comprehensively regulates various aspects of the leasing of mineral deposits, including provisions for state royalties, nothing in the Act indicates an intention by Congress to preempt State taxation. In fact, the Act specifically leaves the States the authority to levy and collect taxes on the output of mines subject to leases. 30 U.S.C. § 189 provides:

> "The Secretary of the Interior is authorized to prescribe necessary and proper rules and regulations and to do any and **[31]** all things necessary to carry out and accomplish the purposes of this chapter, also to fix and determine the boundary lines of any structure, or oil or gas field, for the purposes of this chapter. Nothing in this chapter shall be construed or held to affect the rights of the states or other local authority to exercise any rights which they may have, including the right to levy and collect taxes upon improvements, output of mines, or other rights, property or assets of any lessee of the United States."

In this section, Congress explicitly recognized state authority to tax coal mined pursuant to federal leases.

Mid-Northern Oil Company v. Montana, 268 U. S. 45 (1925), affirming *Mid-Northern Oil Company v. Walker,* 65 Mont. 414, 211 P 353 (1922), carefully scrutinized 30 U.S.C. § 189. The Court held that:

> "Although the act deals with the letting of public lands and the relations of the government to the

lessees thereof, nothing in it shall be so construed as to affect the rights of the states, in respect of such private persons and corporations, to levy and collect taxes as though the government were not concerned." (268 U.S. at 49)

Continuing that analysis,

"In other words, the purpose of Congress was . . . to put beyond doubt the authority of the states to impose taxes upon lessees in respect of their property. . . "

In conclusion the Court held:

"No doubt, what Congress immediately had in mind was the necessity of making it clear that, notwithstanding the interest of the government in leased lands, the rights of the states to tax improvements thereon and the output thereof should not be in doubt . . . We think the proviso plainly discloses the intention of Congress that persons and corporations contracting with the United States under the act, should not, for that reason, be exempt from any form of state taxation otherwise lawful." (268 U. S. at 50)

In the light of the authority to tax without limitation as provided in 30 U.S.C. § 189 and in the light of the reasoning in *Mid-Northern Oil Co. v. Montana* (supra) it is the opinion of this Court, as a matter of law, that the

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Mineral Lands Leasing Act of 1920 does not preempt or limit the right of the State of Montana to impose the tax on the mining activity. The cause of action of Count III fails to state a cause of action upon which the relief requested can be granted.

Count III must be and is dimissed.

Dated this 27th day of July, 1979.

PETER G. MELOY
District Judge

Clean Air Act Amendments of of 1977, Pub. L. No. 95-95 § 125, 42 U.S.C. § 7425

§ 7425. Measures to prevent economic disruption or unemployment

Determination that action is necessary

(a) After notice and opportunity for a public hearing—

(1) the Governor of any State in which a major fuel burning stationary source referred to in this subsection (or class or category thereof) is located,

(2) the Administrator, or

(3) the President (or his designee),

may determine that action under subsection (b) of this section is necessary to prevent or minimize significant local or regional economic disruption or unemployment which would otherwise result from use by such source (or class or category) of—

(A) coal or coal derivatives other than locally or regionally available coal,

(B) petroleum products,

(C) natural gas, or

(D) any combination of fuels referred to in subparagraphs (A) through (C),

to comply with the requirements of a State implementation plan.

Clean Air Act Amendments of 1977,
42 U.S.C. § 7425

Use of locally or regionally available coal or coal derivatives to comply with implementation plan requirements

(b) Upon a determination under subsection (a) of this section—

(1) such Governor, with the written consent of the President or his designee,

(2) the President's designee with the written consent of such Governor, or

(3) the President

may by rule or order prohibit any such major fuel burning stationary source (or class or category thereof) from using fuels other than locally or regionally available coal or coal derivatives to comply with implementation plan requirements. In taking any action under this subsection, the Governor, the President, or the President's designee as the case may be, shall take into account, the final cost to the consumer of such an action.

Contracts; schedules

(c) The Governor, in the case of action under subsection (b)(1) of this section, or the Administrator, in the case of an action under subsection (b)(2) or (3) of this section shall, by rule or order, require each source to which such action applies to—

(1) enter into long-term contracts of at least ten years in duration (except as the President or his designee may otherwise permit or require by rule or

order for good cause) for supplies of regionally available coal or coal derivatives,

(2) enter into contracts to acquire any additional means of emission limitation which the Administrator or the State determines may be necessary to comply with the requirements of this chapter while using such coal or coal derivatives as fuel, and

(3) comply with such schedules (including increments of progress), timetables and other requirements as may be necessary to assure compliance with the requirements of this chapter.

Requirements under this subsection shall be established simultaneously with, and as a condition of, any action under subsection (b) of this section.

Existing or new major fuel burning stationary sources

(d) This section applies only to existing or new major fuel burning stationary sources—

(1) which have the design capacity to produce 250,000,000 Btu's per hour (or its equivalent), as determined by the Administrator, and

(2) which are not in compliance with the requirements of an applicable implementation plan or which are prohibited from burning oil or natural gas, or both, under any other authority of law.

Clean Air Act Amendments of 1977,
42 U.S.C. § 7425

Actions not to be deemed modifications of major fuel burning stationary sources

(e) Except as may otherwise be provided by rule by the State or the Administrator for good cause, any action required to be taken by a major fuel burning stationary source under this section shall not be deemed to constitute a modification for purposes of section 7411(a)(2) and (4) of this title.

Treatment of prohibitions, rules, or orders as requirements or parts of plans under other provisions

(f) For purposes of sections 7413 and 7420 of this title a prohibition under subsection (b) of this section, and a corresponding rule or order under subsection (c) of this section, shall be treated as a requirement of section 7413 of this title. For purposes of any plan (or portion thereof) promulgated under section 7410(c) of this title, any rule or order under subsection (c) of this section corresponding to a prohibition under subsection (b) of this section, shall be treated as a part of such plan. For purposes of section 7413 of this title, a prohibition under subsection (b) of this section, applicable to any source, and a corresponding rule or order under subsection (c) of this section, shall be treated as part of the applicable implementation plan for the State in which subject source is located.

Clean Air Act Amendments of 1977,
42 U.S.C. § 7425

Delegation of Presidential authority

(g) The President may delegate his authority under this section to an officer or employee of the United States designated by him on a case-by-case basis or in any other manner he deems suitable.

Locally or regionally available coal or coal derivatives

(h) For the purpose of this section the term "locally or regionally available coal or coal derivatives" means coal or coal derivatives which is, or can in the judgment of the State or the Administrator feasibly be, mined or produced in the local or regional area (as determined by the Administrator) in which the major fuel burning stationary source is located.

July 14, 1955, c. 360, Title I, § 125, as added Aug. 7, 1977, Pub.L. 95-95, Title I, § 122, 91 Stat. 722.